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October 15, 1956

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CONCORD, N.H.

Mr. Frederick N. Clarke  
Commissioner of Motor Vehicles  
State House Annex  
Concord, New Hampshire

Dear Mr. Clarke:

This is in response to your letter of September 25, 1956, in which you requested our views upon certain aspects of RSA 265, Motor Vehicle Road Tolls.

You forwarded with your letter a brief filed with you by James D. O'Neill, Esq., on behalf of the Retail Gasoline Dealers Association; and the questions which you asked will be answered in the context of the Association's position as stated by Mr. O'Neill. The case thus presented is essentially as follows.

Distributors are defined by law (RSA 265:2, VI) as "(a) persons importing or causing to be imported motor fuel into the state." . . . and "(b) persons producing, refining, preparing, distilling, manufacturing, blending or compounding motor fuel within the state." We are here concerned only with the class of persons first described. Over the years in the administration of the statute distributors have been deemed to be those persons - usually major oil companies - who actually bring or are directly responsible for bringing fuel into the state.

Gasoline reaches the motorist through one of two channels. Either the distributor itself owns retail outlets and thus sells its product to the final user, or the distributor sells the fuel to independently owned or leased stations with the owners or operators of the stations selling to the motorist. We can, of course, assume that Mr. O'Neill is correct in stating that by far the greatest portion of gasoline today is sold through independent or leased stations. Some stations, presumably, are still distributor-owned.

The statute (RSA 265:4) imposes the road toll "upon the sale of each gallon of motor fuel sold by distributors thereof."

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The distributor is required to collect the tax from the purchaser, although he himself pays it in the first instance (RSA 265:10). In determining the amount of the toll for which he is liable the section last cited offers the distributor his choice of two alternative methods of calculation. He may, on the one hand, make a return to the Commissioner of Motor Vehicles showing the number of gallons "sold and used in the state during the previous calendar month . . ." or he may elect, on the other hand, as a measure of the gallonage sold or used by him, to show "the gross quantity of motor fuel purchased or imported . . . less a tare of one per cent for shrinkage or loss by evaporation." (Emphasis added). The use of the underlined phrase in the present context is of considerable significance in the interpretation of the chapter as will later appear.

The gross amount of the toll to be collected, then, seems calculable with certainty under the foregoing provisions.

The Legislature in the enactment of RSA 265 recognized that not all of the product designated as motor fuel and with respect to which the toll had been collected would be used for its primary purpose. Some would be devoted to other uses. Hence the following provision of RSA 265:19, I:

"Any person who shall use any motor fuel, with respect to which the road toll herein imposed has been paid, in any way other than in motor vehicles for the purpose of generating power for the propulsion thereof upon the public highways . . . shall be entitled to a refund to the extent of the amount of said tolls so paid, with respect to such motor fuel."

Retail dealers in the scheme of RSA 265 are entitled to such refunds just as are other persons who use motor fuel for other than its ordinary purpose of propelling motor vehicles on the highways. It is, indeed, not understood that refunds are refused with respect to fuel used for washing and cleaning by station operators, or used by them in the operation of stationary engines.

The question becomes whether losses by certain natural forces acting upon gasoline held for sale by retail dealers are to be held uses as contemplated by the Legislature in providing as last quoted above. Mr. O'Neill in his brief shows that gasoline held in storage undergoes a considerable loss in volume through evaporation. He gives figures indicating losses between 9/10 of 1% and 3%. Evaporation is an important factor in the several transfers from one container to another to which the station operator is a party. Another factor bearing upon the volume of gasoline is that of temperature. As gasoline is cooled

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it decreases in volume. An example by Mr. O'Neill based upon certain assumed temperature changes shows a change of volume of 1.86%. Certain other losses are suggested including spillage.

The word "use" is one of exceedingly broad significance. To indicate its scope would require many pages. See, generally, 43 W & P 460; with respect to gasoline, see Idem 480. In the context of RSA 265 it does not include, however, "a tare . . . for shrinkage or loss by evaporation." Such tare is to be allowed to distributors only - and it is to be limited to 1%. RSA 265:10 supra. When an allowance for tare was intended, it was provided in terms. It is proper to hold, as a matter of statutory construction, that the specific provision thus made is the only provision for its application.

We conclude, then, that the provision for refunds with respect to fuel used otherwise than for the propulsion of motor vehicles upon the public highways does not authorize you, as the administrator of the law, to make refunds with respect to losses by shrinkage or evaporation except as specifically provided in section 10.

One cannot read Mr. O'Neill's brief without recognizing that the present form of the statute may well fail to take into account the true facts of the gasoline business. The word "dealer" appears but once (s. 19). The word is not defined, cf. s. 2. Only the distributor is considered and the huge business of independent retail marketing of gasoline which has developed according to Mr. O'Neill's exposition is completely overlooked.

We do not believe, however, that RSA 265 confers upon you or any other administrative official the authority to make the changes in the law which may be indicated by present circumstances. Your authority is limited to the administration of the statute as it was enacted.

In such circumstances requests for the amelioration of the apparent hardships imposed by the law might well be addressed to the Legislature.

Very truly yours,

Warren E. Waters  
Deputy Attorney General

WEW/aml  
(Brief returned)

cc: Bureau of Administration  
10/17/56